

REMARKS

Claims 35-47 are pending. Claims 40 and 41 have been amended to depend from claim 38. Claim 47 is new, and supported by the specification as-filed, *inter alia*, at pages, 6, 9-10, and 15, and Figs. 1-3. No new matter has been added by this amendment.

Rejection under 35 U.S.C. § 102(e)

Claims 35-46 are rejected under 35 U.S.C. § 102(e) as anticipated by U.S. Patent No. 6,264,650 to Hovda et al. (“Hovda”). This rejection is respectfully traversed.

Hovda describes a device for electrosurgical treatment of an intervertebral disc. The device has a plurality of electrodes capable of applying electrical energy to a target location to ablate or stiffen tissue. In some embodiments, “[t]he current flow path between the electrode terminals and the return electrode(s) may be generated by submerging the tissue site in an electrical conductive fluid...or by directing an electrically conducting fluid along a fluid path to the target site (i.e., a liquid, such as isotonic saline, hypotonic saline or a gas, such as argon).” (Hovda at 15:62-16:1).¹ Other conductive fluids, such as “blood or intracellular saline” are also described. (*Id.* at 16:10-12).

Claim 35 recites “at least one therapeutic substance delivery effector...capable of delivering a therapeutic substance.” Hovda does not teach, disclose, or suggest such an effector for delivering of a *therapeutic substance*. While electrical energy is utilized by Hovda for therapeutic purposes, electrical current is not a “substance.” Further, the substance released by Hovda is not a therapeutic substance, rather it is introduced to enhance the conductivity of the electrodes. Therapeutic substances treat or cure diseases or disorders, or provide some other remedial function. Hovda does not teach, suggest, or disclose that its conductive fluid is used to treat, cure, or remedy tissue. In fact, Hovda clearly indicates that the conductive fluid is an *optional* practice (*id.* at 15:62-16:1), and when used, Hovda discloses a “suction tube 211 for aspirating the fluid after it has completed the conductive path” (*see id.* at 26:27-32). Aspiration is indicated as helpful because it “*prevents the fluid from flowing into the body.*” (*Id.* at 26:19-20). Clearly the conductive fluid described in Hovda is not therapeutic.

Thus, Hovda fails to disclose each and every element of claim 35. Accordingly, Applicants respectfully submit that this rejection should be withdrawn. As claims 36-46 depend from independent claim 35, the rejections of these claims should be withdrawn as well, for at least this reason.

¹ Emphasis added unless otherwise noted.

New Claim 47

Independent claim 47 is new. Applicants respectfully submit that claim 47 is allowable over the prior art of record because claim 47 also recites "at least one therapeutic substance delivery effector...capable of delivering a therapeutic substance," which is recited in claim 35.

CONCLUSION

It is believed that claims 35-47 are in condition for allowance. Should the Examiner not agree with any of Applicant's positions or arguments herein, a telephonic or personal interview is respectfully requested to discuss and resolve any remaining issues.

A one-month extension fee in the amount of \$120 is believed due at this time. Please charge this fee, and any additional fee(s) that may be due, to Jones Day Deposit Acct. No. 503013.

Respectfully submitted,

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